APPEAL NO. 93259

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on March 9, 1993, (hearing officer) presiding as hearing officer. He determined that because the appellant (claimant) failed to dispute her treating doctor's assessment of maximum medical improvement (MMI) within 90 days, she reached MMI on June 19, 1992 with a 5% whole body impairment. Claimant appeals on several grounds urging that she has shown good cause for not contesting within 90 days and that she should not be penalized for errors in her treating doctor's diagnosis and for his premature certification of MMI and impairment rating and that the issue was not raised in the benefit review conference. Respondent (carrier) urges that the hearing officer's determination is correct and supported by the evidence and should be affirmed.

DECISION

Finding merit to the claimant's assertion of error, we reverse and render.

There was no dispute concerning the claimant sustaining a repetitive trauma type injury to her wrist on or about (date of injury). The only issues presented at the contested case hearing were whether the claimant reached MMI and, if so, the proper impairment rating. The claimant was under the treatment of (Dr. C) from August 1991 onward, although she was referred to other doctors beginning in March 1992 through the end of the year. The employer apparently arranged for light duty for the claimant and she continued in her employment until March 30, 1992 when she was terminated for unrelated reasons. In any event, Dr. C states in a "05/12/92" examination report that the claimant is being referred to a "specialty" physician, and indicates that the claimant is being released from his active care. In this report, Dr. C notes there has been marked improvement and that the conservative approach has reached its maximum level, but that if the claimant's "condition persists, however, a surgical intervention may very well be necessary in the near future." Apparently about this same time, Dr. C filed a Report of Medical Evaluation on a Texas Workers' Compensation Commission Form 69 (TWCC-69) indicating the claimant would reach MMI on June 19, 1992 with a 5% whole body impairment rating. Although the form is undated, a stamp on it shows that it was received by the Commission on May 26, 1992.

Subsequently, a benefit review conference was held and in a document entitled Benefit Review Conference Agreement (TWCC-24) and dated June 30, 1992, the claimant, who was unrepresented, the carrier, and the benefit review officer signed an agreement providing for the payment of temporary income benefits from April 1, 1992 through June 19, 1992, and providing that MMI was reached on June 19, 1992, and that the impairment rating is 5% with income benefits to be paid for 15 weeks beginning June 19, 1992. The claimant testified that she signed the agreement because of her financial need. The claimant continued to have trouble with her wrist, had an MRI performed on September 15, 1992 and was examined and treated by (Dr. B) and (Dr. F). Medical reports from Dr. F question whether the claimant has reached MMI, and indicate that the claimant has internal

derangement of the wrist with ganglion cyst and effusion and that she is symptomatic in her arm. His reports also instruct the claimant to remain off of work. In a report dated January 29, 1993, Dr. F indicates that the claimant's continued medical problem relates to her initial injury and that "there are problems involved here that were not addressed at the time (Dr. C) made his initial evaluation." In a letter dated "02/03/93", Dr. C states that it appears that the MMI he previously gave was erroneous and that information now available was not available at the time. He states that he rescinds the MMI "calculation" he made on May 19, 1992.

The hearing officer found that Dr. C certified that the claimant reached MMI with a 5% impairment rating on June 19, 1992, that it was the first and only certification, and that the claimant signed an agreement as to the MMI and impairment rating on June 30, 1992. He further found that the claimant signed the agreement due to financial need, and without legal representation or full knowledge of the ramifications of her actions, that she did not protest Dr. C's assessment of MMI and impairment rating until January 1993, and that Dr. C rescinded his certification of MMI and impairment rating on February 3, 1993. The hearing officer concluded that pursuant to Tex. W. C. Comm'n, 28 TEX. ADMIN CODE § 147.4(d) (TWCC Rule 147.4(d)) there is good cause to set aside the benefit review conference agreement and that the greater weight of the objective medical evidence established that the claimant has not reached MMI as the result of her (date of injury), compensable injury. However, the hearing officer goes on to conclude that:

> Pursuant to Commission Rule 130.5(e), (Dr. C's) assessment of maximum medical improvement has become final since the Claimant failed to dispute the assignment within 90 days of June 19, 1992. Therefore, the Claimant reached maximum medical improvement on June 19, 1992, with 5% whole body impairment.

Although not critical to this decision we observe that a significant question arises in this case concerning the "agreement" arrived at during the benefit review conference. Agreements and settlements are provided for under the 1989 Act with the terms being defined in Article 8308-1.03(3) and (43) as:

> "Agreement" means the resolution by the parties to a dispute under this Act of one or more issues regarding an injury, death, coverage, compensability, or compensation. The term does not include a settlement.
>
> "Settlement" means a final resolution of all the issues in a workers' compensation claim that are permitted to be resolved under the terms of this Act.

Article 8308-4.33 provides for certain restrictions on settlements including limiting lump sum payments, prohibiting the limiting or termination of medical benefits, and

precluding the resolution of impairment rating issues prior to the reaching of MMI. A settlement must be approved by the director of the division of hearings and he may do so only if: (1) the settlement accurately reflects the terms of the agreement between the parties; (2) the settlement reflects adherence to all appropriate provisions of law and the policies of the Commission; and, (3) under the law and facts, the settlement is in the best interest of the claimant. Under the facts of this case, it appears to us that the document the parties signed on June 30, 1992, is more in the nature of a settlement. From the evidence before the hearing officer, it appears that the arrangement entered into purports to finally resolve all the issues in this claim. As such, it would require the approval of the director of hearings and would have to be determined to be in the best interest of the claimant. We believe the 1989 Act establishes a safety net before a claim may be finally and fully settled (absent, of course the lifetime medical benefits) and requires that it be evaluated in light of the best interests of the claimant. It appears the facts in this case bring the arrangement or "agreement" within the term "settlement" since it appears no issues remained after the parties agreed to TIBs, MMI and impairment rating. Presupposing, however, that a valid agreement existed in this case, the hearing officer concluded that there was good cause to set aside the agreement. Under the circumstances, we cannot say that his determination in this regard was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). Clearly, the legislature contemplated that a less stringent standard apply to a pro se claimant seeking relief from an agreement. Texas Workers' Compensation Commission Appeal No. 92426, decided October 1, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992.

The matter that causes us to reverse in this case is not the question of agreement or settlement, but rather our concern with the invalidity of the purported MMI and impairment rating and our conclusion that if there was no valid certification of MMI or impairment rating, there was nothing to become final within 90 days, which was the basis for the hearing officer's ruling against the claimant. The carrier argues that under TWCC Rule 130.5(e), and specifically citing our decision in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, the first determination of MMI and impairment rating must be disputed within 90 days or it becomes final, and that is what has occurred here. We did hold in Appeal 92670, *supra*, that Rule 130.5(e) applies to both MMI and impairment rating, that it provides a liberal method and time limit by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits, and that the rule applies with equal force to both carriers and claimants. However, that decision presupposes a determination of MMI and impairment rating has been properly made. The evidence at the hearing, the actions of the parties, the document signed and the hearing officer's findings all clearly show that Dr. C provided a prospective and apparently premature determination of MMI and impairment rating. His certification in May that the claimant "reached" MMI on June 19, 1992 can only be read to mean that he anticipated MMI would be reached by the claimant a month in the future.

Under the 1989 Act, an impairment rating is assigned after there is a certification that MMI has been reached. Article 8308-4.26(d). Where, as here, the determination of MMI is to take place prospectively or in the future, a current date of MMI has not been certified and an impairment rating cannot be assigned. Dr. C's report, although on a Form TWCC-69, would indicate that there was no current MMI but that MMI would happen in the future. We have stated that an anticipated date of MMI is not a statement or certification that MMI has been reached. *See generally* Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993; Texas Workers' Compensation Commission Appeal No. 92198, decided July 3, 1992; Texas Workers' Compensation Commission Appeal No. 92127, decided May 15, 1992. With no valid MMI date, there can be no valid impairment rating under the circumstances. It follows that there was nothing to become final at the expiration of the 90 days and there was nothing for the claimant to dispute. As this was the foundation for the hearing officer's decision, the decision cannot stand. We note also in this case that the doctor purportedly determining MMI and assessing an impairment rating subsequently rescinded his purported determination of MMI. We have held that a doctor can subsequently amend or change his determination of MMI for appropriate and proper reasons. Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993; Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. The reasoning of those decisions might apply with equal force under the circumstances of this case.

For the above reasons, the decision of the hearing officer is reversed and we render a new decision that the claimant did not fail to dispute the MMI and impairment rating of June 19, 1992 since they had not been properly accomplished and that therefore, the claimant did not reach MMI with a 5% impairment rating on June 19, 1992.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge